

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

IN RE: SANTA FE NATURAL TOBACCO  
COMPANY MARKETING & SALES  
PRACTICES AND PRODUCTS LIABILITY  
LITIGATION

This Document Relates to All Cases

LEAD CASE NO. MD 16-2695 JB/LF

**NOTICE OF SUPPLEMENTAL  
AUTHORITY**

Plaintiffs notify the Court of *Cherry v. Dometic Corp.*, \_\_\_ F.3d \_\_\_, No. 19-13242, 2021 WL 346121, at \*1 (11th Cir. Feb. 2, 2021). The Eleventh Circuit held “Rule 23 provides no basis to require administrative feasibility.” Therefore, the court “limit[ed] ascertainability to its traditional scope: a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination.” *Id.* at \*5. The court explained “membership can be capable of determination without being capable of *convenient* determination.” *Id.* at \*4. The court rejected application of “the heightened standard of the Third Circuit.” *Id.* at \*3.

The court held that “[b]ecause administrative feasibility has no connection to Rule 23(a), it is not part of the ascertainability inquiry.” *Id.* at \*4. Rather, a district court “may consider administrative feasibility as part of the manageability criterion of Rule 23(b)(3)(D),” which it “must evaluate in comparative terms . . . . First, would a class action create more manageability problems than its alternatives? And second, how do the manageability concerns compare with the other advantages or disadvantages of a class action?” *Id.* at \*5. Further, a “plaintiff proves administrative feasibility by explaining how the district court can locate the remainder of the class *after* certification.” *Id.* at \*4. *Cherry* is the Eleventh Circuit’s first published decision on this issue. *Id.* at \*3.

This decision relates to the parties' arguments regarding ascertainability. Defendants conflate ascertainability and administrative feasibility; they push the adoption of a minority position among Circuit Courts. *See* Defs.' Opp'n (Doc. 315) 26 (citing *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 950 (11th Cir. 2015) (unpublished), which *Cherry* overruled). But ascertainability is separate from administrative feasibility, and "administrative feasibility is not a requirement under Rule 23." *Cherry*, 2021 WL 346121 at \*5. The relevant inquiry is whether "Plaintiffs' class definitions show class membership is based on . . . objective criteria" (whether, when, and in which state a person purchased Natural American Spirit Cigarettes). *See* Pls.' Reply in Supp. of Mot. for Class Certification 11.

Dated: February 11, 2021

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### **CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2021, I served a copy of the foregoing on the Clerk of Court by CM/ECF, which will provide notification to all parties and counsel of record.

By: s/ Jeffrey L. Haberman  
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